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ABSTRACT

In many western countries, corporal punishment has been abolished as a form of punishment in criminal trials and in schools. Under South African common law, persons entitled to enforce discipline may inflict corporal punishment within certain guidelines established by the Supreme Court. For the first time in the Republic of South Africa (RSA), the Constitution of the RSA, 1993, contains a chapter on all citizens' fundamental human rights. Section 11(2) provides for a general prohibition of cruel, inhuman or degrading treatment or punishment. The question is whether section 11(2) will be applied to corporal punishment in general and to schools, in particular. This paper describes the constitutional provisions pertaining to corporal punishment in Namibia, Zimbabwe, Germany, Canada, and the United States. It also discusses some South African statutes dealing with corporal punishment and Chapter 3 of the Constitution of the RSA, 1993. It is concluded that if corporal punishment in schools is declared to be cruel, inhumane, or degrading, and thus unconstitutional, educators will have to undergo a paradigm shift in their views of school discipline. A Constitutional Court may respond to questions about corporal punishment in schools as follows: (1) corporal punishment in schools is not cruel, inhumane, or degrading "per se"; (2) the source and nature of the schoolmasters' authority may affect the final decision as to the applicability of section 11(2); and (3) sound education grounds for retaining corporal punishment as an available option may be advanced. (LMI)

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A. BACKGROUND AND INTRODUCTION

1. Introduction

1.1 In many western countries corporal punishment has been abolished as a form of punishment in criminal trials and in schools.

1.2 In terms of the South African common law a person who is entitled to enforce discipline, is entitled to inflict corporal punishment within certain guidelines developed by the supreme court. As a result of cases of the

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abuse of the power of corporal punishment in schools, the statutes regulating discipline in schools lay down the limits of the imposition of corporal punishment.

1.3 For the first time in the Republic of South Africa, the Constitution of the RSA, 1993, which came into operation on 27 April 1994, contains a chapter on the fundamental human rights of all the citizens of the country. Section 11(2) provides for a general prohibition of cruel, inhuman or degrading treatment or punishment. The question will be whether section 11(2) of the Constitution of the RSA is going to be applied to (and rule out) corporal punishment in general (adults and juveniles) in terms of criminal and procedural laws and corporal punishment in schools in particular.[1] In view of the influence of the Canadian Charter of Rights and Freedoms upon the drafters of Chapter 3 of the Constitution of South Africa[2] Canadian precedent will also have to be considered[3].

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1. See also Ronald T Hyman and Charles H Rathbone, Corporal Punishment in Schools: Reading the Law, NOLPE (No. 48 in the NOLPE Monograph Series) 1993, Topeka, Kansas, at 1.

2. Azhar Cachalia, Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna and Gilbert Marcus, Fundamental Rights in the New Constitution, Juta and Co, Ltd, March 1994, at 4.

3. Cachalia et al at 5.

2. CONSTITUTIONAL PROVISIONS RELEVANT TO CORPORAL PUNISHMENT IN A NUMBER OF COUNTRIES AND THE JUDICIAL APPROACH THERETO

2.1 Neighbouring countries in Southern Africa

2.1.1 Namibia

Article 8(2)(b) of the Constitution of Namibia provides that no persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In Ex Parte Attorney-General, Namibia: In re Corporal Punishment by organs of State, 1991 (3) SA 76 (NmSc) the Court stated that Article 8 of the Constitution must not be read in isolation but within the context of a fundamental humanistic constitutional philosophy (at 78C). After a review of judicial consensus regarding most of the general objections to corporal punishment (at 87D-H) as well as the emerging of an accelerating consensus against corporal punishment for adults throughout the civilised world (at 88A-89J) Mahomed AJA concludes that the inflicting of corporal punishment on adults as well as on juveniles, constitutes degrading and inhuman punishment within the meaning of the Constitution (at 92J-93D).

The Court proceeds to deal with corporal punishment in schools (at 94D) and concludes (at 95A) that any corporal punishment inflicted upon students at Government schools pursuant to the provisions of the

relevant Code would be in conflict with article 8(2)(b) of the Namibian Constitution.

2.1.2 Zimbabwe

Section 15(1) of the Constitution of Zimbabwe provides that no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment. In the case of S v A Juvenile 1990 (4) SA 151 (ZSC) the Court had to decide whether the imposition of a whipping or corporal punishment upon juveniles is an inhuman or degrading punishment or treatment which violates the prohibition contained in section 15(1) of the Constitution. Dumbutshena CJ refers to the adverse features which are inherent in the inflicting of a whipping as well as to persuasive authorities from other jurisdictions, which led to the conclusion that such corporal punishment inflicted on an **adult** breached the Constitution (at 152B-E).

In the process of dealing with judicial punishment of **juveniles** the Court referred to the approach in the United States with regard to the Eighth Amendment to the Constitution and that ".. the amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society..", and concluded that this ideal also applies to the Zimbabwean society (at 159 G-H). The Court also deals with corporal punishment meted out to school children (at 161E) although the Court was not called upon to give a ruling on that issue.

He concluded that judicial corporal punishment is unconstitutional, whether it is imposed on an adult or a juvenile (at 162H-I).

As far as it concerns judicial corporal punishment and juveniles, Gubbay JA agrees with the conclusion reached by Dumbutshena CJ. On some issues he disagrees and makes the following points, namely:

(a) A moderate correction is not to be likened in severity to the caning by a schoolmaster of a disobedient pupil; and

(b) With regard to judicial corporal punishment he is prepared to go further than the European Court of Human Rights and to hold that judicial whipping, no matter the nature of the instrument used and the manner of execution, is a punishment inherently brutal and cruel. (at 168I)

McNally JA, in S v A Juvenile, supra at 170C, in a dissenting judgment, poses the question: because a court may rule out adult strokes as unconstitutional, must it follow that juvenile cuts are unconstitutional? Or, progressing down the scale, does it follow that corporal punishment in schools is unconstitutional, or that smacking a naughty child is ipso facto a violation of that child's fundamental human rights? He finds that there is a clear distinction between the corporal punishment of adults and the corporal punishment of juveniles (at 170H). Amongst his conclusions are the following:

(a) Corporal punishment in schools is not a matter for consideration under the Declaration of Rights but that it is a matter for policy determination by pedagogues and educational psychologists; and

(b) Parental discipline is adequately governed by the common law and it is unnecessary to scrutinise it in terms of the Declaration of Rights (at 174D-E).

The outcome of S v A Juvenile, supra, was an amendment to the Bill of Rights by Act 30 of 1990. By and large it follows the minority judgment in that case. When commenting on the proposed amendment Van der Vyver[4] pointed out that the draft legislation, if enacted, will exclude the competence of the Supreme Court to interpret the Constitution in such a way that a sentence of whipping or corporeal (sic ?) punishment upon juveniles will be an inhuman and degrading punishment in contravention of section 15(1) of the Constitution[5]. Section 15(3) of that Act provides that the infliction of moderate corporal punishment upon a person under the age of eighteen years in the circumstances set out in the subsection shall not be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading[6].

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4. "Constitutional options for post-apartheid South Africa." Emory Law Journal. 1991, 745 at 820.

5. Van der Vyver, supra, at 823 and 824.

6. P D de Kock and J C Bekker, "Is corporal punishment on its way out?". Journal of Contemporary Roman-Dutch Law. 1993 124 at 126.

2.2 Other countries

Because the Court was not called upon to decide the issue of corporal punishment inflicted on schoolchildren the remarks of Dumbutshena CJ in the case of S v A Juvenile, supra, in that regard are therefore obiter. His remarks are however supported by German Constitutional Law which holds that the imposition of corporal punishment on children at schools violates the German Constitution. In many countries judicial corporal punishment upon adults and juveniles has been abolished and in other countries enactments dealing with judicial corporal punishment have been declared unconstitutional (at 88 and 89). Modern pedagogy is however said to challenge punishment as such, corporal or otherwise[7].

The Canadian Charter of Rights is part of the Constitution Act, 1982, of Canada[8]. Section 1 of the Charter provides that the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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7. S v A Juvenile, supra, at 173C-D).

8. Peter W Hogg. Constitutional Law of Canada. Third Edition. 1992. Carswell. Thompson Professional Publishing, at 777

This section implicitly authorizes the courts to balance the guaranteed rights against competing societal values[9]. Section 12 of the Charter provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. Birch and Richter[10] are of the opinion that corporal punishment is the most logical candidate for a substantive violation of this section. The authors say that in the United States the American cruel and unusual provision was not applied in schools but that they are of the opinion that section 12 of the Charter will be applied to Canadian students:

"It is likely that corporal punishment will be struck down as contrary to the Charter but it may take many years and more than one trip to the Supreme Court to produce this result."

In the case of Ingraham v Wright, 430 US 651 (1977) the majority held that the Eigth Amendment applies only in criminal contexts and not to civil disciplinary matters involving children in school[11],[12].

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9. Hogg at 801.

10. Comparative Schools Law edited by Ian Birch and Ingo Richter. Pergamon Press, at 220 and 221.

11. Hyman and Rathbone, supra, at 3.

12. Constitutions of the countries of the world (United States of America), edited by Albert P Blaustein and Gisbert H Flanz. Oceana Publications, Inc. Dobbs Ferry, New York. 1990, at 11.

B. THE POSITION IN THE RSA

1. Some South African statutes dealing with corporal punishment

1.1.1 Criminal Procedure Act, 1977

Sections 292, 293 and 295 of the Criminal Procedure Act, 1977, provide for sentences of corporal punishment, the limitations and the manner of the imposition and execution thereof. Section 294 of the Criminal Procedure Act, 1977, provides for the imposition of a moderate correction of a whipping on juvenile males under the age of 21 years.

1.1.2 Reservations regarding judicial corporal punishment before the introduction of a bill of rights

In South Africa judicial corporal punishment is still a permissible option. Before 27 April 1994 there were no constitutional safeguards against inhuman or degrading punishment. Because of this, the attitude of some of its judges towards whipping as a penalty draws out significantly their abhorrence towards the penalty (per Dumbutshena C J,in S v A Juvenile, supra at 157B-C[13]. In S v A Juvenile (supra at 157D-G) reference is also made to the judgment of the Appellate Division of the Supreme Court of South Africa in the case of S v Van As and Another 1989(1) SA 532 (A), where it was held that "... whipping was by its very

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[13]. See also De Kock and Bekker, supra, at 125.

nature an extremely humiliating and physically very painful form of punishment and ought to be imposed with great circumspection...".

In Ex Parte Attorney-General, Namibia: In re Corporal Punishment by organs of the State, 1991 (3) SA 76 (NmSc) reference is made to the fact that South Africa has never had a constitutional provision which entitles the Court to strike down legislation of the central Parliament (89F):

"Some of the strongest and most eloquent criticisms of corporal punishment have however come from the judiciary in that country in the course of interpreting and applying the manifold statutes which authorise and regulate corporal punishment."

1.2 Education Affairs Act (House of Assembly), 1988

1.2.1 Corporal punishment in schools

The Regulations in terms of the Education Affairs Act (House of Assembly), 1988, dealing with corporal punishment in public schools, state-aided schools and hostels, are a typical example of existing South African legislation dealing with the subject. These Regulations provide for the administration of corporal punishment, the procedure, limitations and the extent thereof.

1.2.2 Reservations regarding corporal punishment for juveniles before the introduction of a bill of rights

Professor JMT Labuschagne of the University of Pretoria subjected the punishment of children to an exhaustive evaluation[14]. He raises the question whether parents, teachers and other persons in loco parentis should have the right physically to punish their children or pupils. He lists[15] various scientific objections to the application of force against children and concludes[16] that the right of parents, teachers and other persons in loco parentis deliberately to apply force against children should be abolished.

2. Constitutional interpretation in the RSA before the introduction of a bill of fundamental rights

Cachalia, et al[17], points out that before the introduction of a bill of rights, South African courts have had to test the constitutional validity of legislation and to monitor the exercise of legislative power, and cites examples of a literal approach to interpretation of the constitution and also of a restricted approach.

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14. "Punishment of children: A Criminal-Law Evaluation". De Jure, 1991 at 23.

15. at 36 to 41.

16. at 41.

17. at 5.

3. Chapter 3 of the Constitution of the RSA, 1993: Fundamental rights

3.1 Fundamental rights

Chapter 3 provides for 25 fundamental rights, all of which will require careful interpretation, and a general limitation clause in section 33. The ambit and the efficacy of each right will depend on its examination within the framework contained in section 33[18].

Section 11(2) of the Constitution provides:
"No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

The Courts are given extremely wide powers in interpreting the provisions of the bill of rights. Section 35(1) stipulates that the court must promote the values which underlie an open and democratic society based on freedom and equality. The use of public international law and comparable foreign case law is also permitted[19].

In the early development of South African constitutional law it is likely that Canadian precedent will be of particular importance because of the

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18. Cachalia et al, supra, at 5.

19. PJ Visser and JM Potgieter. "Some critical comments on South Africa's Bill of Fundamental Human Rights." Journal of Contemporary Roman-Dutch Law. 1994 493 at 496 and 497.

influence which the Canadian Charter of Rights and Freedoms exerted upon the drafters of Chapter 3[20]. Already in June 1994 in the case of Qozeleni v Minister of Law and Order and Another, 1994 (3) SA 625 (ECD) at 633F-G, Froneman J expressed a word of caution in applying comparable case law as enjoined by section 35(1):

"... this should be done with circumspection because of the differing contexts within which foreign constitutions were drafted and operate in, and the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting."[21]

3.2 Interpreting section 11(2) of the bill of rights

Cachalia et al (supra, at 37) states categorically that internationally this right is absolute, non-derogable and unqualified. All that is required to establish a violation of the relevant section is a finding that the state concerned has failed to comply with its obligation in respect of any of these modes of conduct. After reviewing relevant authorities and international jurisprudence on the issues of "cruel punishment", "inhuman punishment" and "degrading punishment", Cachalia et al (at 40) concludes that sections 292, 293 and 294 of the Criminal Procedure Act 51 of 1977 which permit the whipping of both adult and juvenile males in certain circumstances will not survive the test of constitutional

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20. Cachalia et al, supra, at 5

21. These sentiments are echoed by Visser and Potgieter, supra, at 497.

challenge and that section 11(2) cannot be subject to any limitation. The authors, however, do not proceed to deal with corporal punishment in schools.

The concept of cruel and unusual punishment says Hogg (supra, at 1129-1131), has never been satisfactorily defined, but the Supreme Court of Canada has adopted as a test of cruel and unusual punishment, "whether the punishment prescribed is so excessive as to outrage standards of decency." However there seems to be no way of defining "standards of decency".

Recently a number of cases came before the Cape Provincial Division of the Supreme Court of South Africa on automatic review and were dealt with as S v Williams and Five Similar Cases 1994(4) SA 126 (CPD). One of the points raised on review was the constitutionality of corporal punishment imposed on juveniles in terms of section 294(1) of the Criminal Procedure Act of 1977. The Court (at 139H) referred to decisions of the European Court of Human Rights (Tyrer v United Kingdom), the Supreme Court of Zimbabwe (S v A Juvenile) and the Supreme Court of Namibia (Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State), in all of which cases it was held that a juvenile whipping is a cruel and unusual punishment, and concluded (at 139I):

"Whether corporal punishment in respect of juveniles can be justified under section 33(1) [limitation of rights] is not a matter upon which this Court is called to express an opinion: it suffices to say that there is a reasonable prospect that the Constitutional Court may hold that it cannot be justified."

3.3 The authority to inflict corporal punishment

In South Africa it may also be necessary to inquire into the source of the authority for chastisement of children by school masters. In S v A Juvenile, supra (at 162D) the Court ruled, albeit obiter, that once an authority has enacted legislation in this regard, the authority delegated by the parents to school teachers to inflict reasonable physical chastisement on pupils disappears, that is, the common law no longer applies and with that the delegated authority vanishes. In the same case McNally JA makes the point that the Constitution does not prohibit all punishment (at 173A) and he does not agree that all corporal punishment is ipso facto unconstitutional (at 172G). To Mahomed AJA in the Namibian corporal punishment case (supra at 93H) the position is clear that corporal punishment remains an invasion of the dignity of the students and he goes on to say (at 94I) that whatever the position might be in cases where a parent has actually delegated his powers of chastisement to a schoolmaster, it is wholly distinguishable from the situation which prevails when a schoolmaster administers and executes a formal system of corporal punishment which originates from and is

formulated by a governmental authority. Such a schoolmaster does not purport to derive his authority from the parent concerned who is in no position to revoke any presumed "delegation".

In South Africa parents and persons in loco parentis, like teachers, have a certain disciplinary authority in accordance with the common law for the purpose of educating the child and for maintaining discipline at the institution where the child is being educated. It is an original authority and cannot be revoked by the parent[22]. In principle therefore it should not make a difference whether it is a state school, a state-aided school or a private school.

3.4 Procedural regularity

If it should be found in the RSA that corporal punishment in schools is not cruel, inhuman or degrading treatment or punishment per se in contravention of section 11(2) of the Constitution, the matter does not end there. It may be that the particular punishment is grossly disproportionate to the offence in the particular circumstances[23]. As a result of cases of the abuse of the power of corporal punishment in schools, the statutes regulating discipline in schools lay down the procedures for and the limits of the imposition of corporal punishment. Guidelines have

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22. See also MCJ Olmesdahl. "Corporal punishment in schools." 1984 South African Law Journal. 527-544.

23. See Hogg, supra, at 1130 and 1131.

also been developed by the supreme court. Tribe[24] sounds a note of warning with regard to a false sense of security which the criterion of procedural regularity may provide since bodily invasions cannot be remedied after the fact. One should not adopt the approach of shooting first and asking questions later - with fancy remedies to boot.

C. SUMMARY AND CONCLUSIONS

1. Determination of policy

When looking at the legal, education, social and philosophical issues related to corporal punishment, one should be mindful of a word of caution which has already been referred to above, namely that the question of corporal punishment in schools is not a matter for consideration under a bill of rights but that it is a matter for policy determination by pedagogues and education psychologists (per McNally JA in S v A Juvenile, supra at 174D). In this regard it is also interesting to note the views of Professor Albie Sachs, Professor of Constitutional Law at the University of Cape Town who has recently been appointed as one of the members of the Constitutional Court in the RSA. In dealing with religion, education and constitutional law he makes the point regarding the right to a broad, sound education, that he is of the

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[24]. Laurence H Tribe. American Constitutional Law. Second Edition. 1988. Mineola, New York. The Foundation Press Inc., at 1332-1333.

opinion that "... most of us would look primarily to the educationists to develop policies."[25]

2. Possible approach of a constitutional court

Without going into detail regarding the legal, education and social issues surrounding judicial corporal punishment[26] in general and corporal punishment in schools in particular, as far as the RSA is concerned, the questions posed regarding corporal punishment and a bill of rights will have to be resolved by the Constitutional Court and may, in view of the authorities cited above, eventually be answered as follows:

(a) That section 11(2) is not limited to criminal contexts and judicial corporal punishment and may therefore also apply to corporal punishment in schools;

(b) That judicial corporal punishment of adults and juveniles is contrary to section 11(2) as being cruel, inhuman or degrading, and that section 11(2) is not subject to the limitations of section 33(1) of the Constitution;

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25. "Religion, education and constitutional law". Second annual lecture, 7 November 1992. Institute for Comparative Religion in Southern Africa, at 9.

26. See Hyman and Rathbone, supra at 1.

(c) That as far as corporal punishment in schools is concerned-

(i) the school and education environment is unique and cannot be compared to the official environment where judicial punishment is meted out to juveniles and on this ground it cannot be said that corporal punishment in schools is cruel, inhuman or degrading per se;

(ii) the source and nature of the authority of school masters to inflict corporal punishment, which may differ from state schools to state-aided schools and from these schools to private schools, may also affect the final decision as to the applicability of section 11(2) of the bill of rights;

(iii) sound education grounds for retaining corporal punishment as an available option may be advanced, subject to the kind of procedures already developed by the supreme court in the RSA and also subject to the limitations contained in the statutes dealing with corporal punishment as well as to the constraints of the common law.

With regard to this latter point is would be prudent for pedagogues and academics to sort out this question, one way or the other. One would

not want a situation such as the one in Zimbabwe to arise, and then to have to have possible legislative intervention afterwards whichever way the constitutional court may determine the issue. In any event it may also, in the words of Birch and Richter[27], "... take many years and more than one trip to the Supreme Court to produce this result."

3. The significance of this topic as it relates to education law

The administration of corporal punishment in schools has its roots in the South African common law. Over the years the common law has been interpreted and developed by the supreme court and the parameters within which educators were required to operate were established. Further developments were brought about when specific provisions were enacted in education legislation further defining and regulating the administration of corporal punishment in schools.

The Bill of Rights in the Constitution of the RSA, 1993, which is now in operation in the RSA provides that no person shall be subject to cruel, inhuman or degrading treatment or punishment. If, in the light of prevailing conceptions in other legal systems and upon a proper interpretation of the Constitution, corporal punishment in schools is declared to be cruel, inhuman or degrading and thus unconstitutional, this will create a dilemma for educators and the whole field of school discipline will have to undergo a paradigm shift in this regard, and

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[27]. supra, at 221.

educators will have to renew their search for other effective means by which to discipline the children they teach[28].

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[28]. See Hyman and Rathbone, supra at 1.